

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE JDS UNIPHASE CORPORATION
SECURITIES LITIGATION

No. C 02-1486 CW

ORDER DENYING
LEAD PLAINTIFF'S
MOTION TO STRIKE
CERTAIN
AVERMENTS IN
DEFENDANTS'
ANSWERS AND
DENYING
DEFENDANTS'
MOTION FOR
PARTIAL JUDGMENT
ON THE PLEADINGS

Lead Plaintiff Connecticut Retirement Plans and Trust Funds moves to strike certain averments in the answers, filed by Defendant Kevin Kalkhoven and by Defendants JDS Uniphase Corporation (JDS), Josef Straus, Anthony R. Muller and Charles Abbe (JDS Defendants), to the second amended consolidated complaint (SACC). Kalkhoven and the JDS Defendants separately oppose the motions. The JDS Defendants also move for partial judgment on the pleadings. Kalkhoven joins the motion, and Lead Plaintiff opposes it. The matters were heard on July 15, 2005. Having considered the parties' papers, the evidence cited therein and oral argument on the motions, the Court DENIES Lead Plaintiff's motion to strike certain averments in Defendants' answers and DENIES Defendants' motion for partial judgment on

1 the pleadings.

2 BACKGROUND

3 The following facts are alleged in the SACC. JDS
4 manufactures and supplies components of fiber-optic networks to
5 telecommunications and cable television system providers.
6 Straus, Muller, Abbe and Kalkhoven are current and former
7 executive officers and directors of JDS. Kalkhoven's retirement
8 was announced in a press release on May 18, 2000, although he
9 continued to be employed full-time by JDS until July 31, 2000,
10 and part-time until July 31, 2001.

11 Lead Plaintiff purports to represent a class of persons and
12 entities that purchased or otherwise acquired securities of JDS
13 between October 28, 1999 and July 26, 2001. Lead Plaintiff
14 alleges that, during the class period, Defendants engaged in a
15 scheme to inflate artificially the price of JDS stock by
16 fraudulently recognizing revenue, falsely representing that
17 demand for JDS products was strong, and overstating the value of
18 its inventory by failing to write off excess inventory. Lead
19 Plaintiff further alleges that Defendants benefitted from this
20 scheme by selling stock at inflated prices and by using the
21 value of JDS stock to purchase other companies for less than
22 their worth.

23 Lead Plaintiff filed the complaint that initiated this
24 lawsuit on March 27, 2002. On October 11, 2002, Lead Plaintiff
25 filed the first amended consolidated complaint (FACC), which
26 alleged causes of action under the Securities Act of 1933
27 (Securities Act) and the Securities Exchange Act of 1934

1 (Exchange Act). Defendants moved to dismiss the FACC and, on
2 November 3, 2003, the Court issued an order denying Defendants'
3 motion to dismiss the Securities Act claims and granting the
4 motion to dismiss the Exchange Act claims. The Court granted
5 Lead Plaintiff leave to amend these claims.

6 On January 9, 2004, Lead Plaintiff filed the SACC. The
7 SACC alleges that JDS, Straus, Muller and Kalkhoven violated
8 section 11 of the Securities Act; JDS violated section 12(a)(2)
9 of the Securities Act; Straus, Kalkhoven and Muller violated
10 section 15 of the Securities Act; JDS, Kalkhoven, Muller, Abbe
11 and Straus violated section 10(b) of the Exchange Act and Rule
12 10b-5 promulgated thereunder; Kalkhoven, Muller and Straus
13 violated section 14 of the Exchange Act and Rule 14a-9
14 promulgated thereunder; Kalkhoven, Muller, Straus and Abbe
15 violated section 20(a) of the Exchange Act; and Kalkhoven,
16 Muller, Straus and Abbe violated section 20A of the Exchange
17 Act.

18 On March 9, 2004, Defendants moved to dismiss the SACC. On
19 January 6, 2005, the Court granted the motion to dismiss one of
20 the Securities Act claims against Kalkhoven, and denied the
21 motion to dismiss the remaining claims. On February 28, 2005,
22 Kalkhoven and the JDS Defendants separately answered the SACC.
23 On April 21, 2005, Lead Plaintiff moved to strike certain
24 averments in the JDS Defendants' answer. On May 20, 2005, Lead
25 Plaintiff moved to strike certain averments in Kalkhoven's
26 answer. On June 10, 2005, the JDS Defendants moved for partial
27 judgment on the pleadings.

LEGAL STANDARD

I. Motion to Strike

Federal Rule of Civil Procedure 12(f) states as follows:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Striking a party's pleading is an "extreme measure," and Rule 12(f) motions are viewed with disfavor and are infrequently granted. Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000); see also Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996).

II. Motion for Partial Judgment on the Pleadings

A motion for judgment on the pleadings, like a motion to dismiss for failure to state a claim, addresses the sufficiency of a pleading. Judgment on the pleadings may be granted when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that the moving party is entitled to judgment as a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989). The court may consider, in addition to the face of the pleadings, exhibits attached to the pleadings, Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), and facts which may be judicially noticed. Mullis v. United States Bankr. Court, 828 F.2d 1385, 1388 (9th Cir. 1987).

In testing the sufficiency of a pleading, the well-plead

1 allegations of the non-moving party are accepted as true, while
2 any allegations of the moving party which have been denied are
3 assumed to be false. Hal Roach Studios, 896 F.2d at 1550.
4 However, the court need not accept conclusory allegations. W.
5 Mining Counsel v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The
6 court must view the facts presented in the pleadings in the
7 light most favorable to the non-moving party, drawing all
8 reasonable inferences in that party's favor, Gen. Conference
9 Corp. of Seventh Day Adventists v. Seventh-Day Adventist
10 Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989), but
11 need not accept or make unreasonable inferences or unwarranted
12 deductions of fact. McKinney v. De Bord, 507 F.2d 501, 504 (9th
13 Cir. 1974).

14 DISCUSSION

15 I. Motions to Strike

16 A. Timeliness

17 Lead Plaintiff's motions to strike are not timely. Under
18 Federal Rule of Civil Procedure 12(f), a party must file a
19 motion to strike within twenty days after service of the
20 pleading. Here, Kalkhoven and the JDS Defendants each answered
21 the SACC on February 28, 2005. However, Lead Plaintiff did not
22 file its motions to strike certain averments in the JDS
23 Defendants' answer and Kalkhoven's answer until April 21, 2005
24 and May 20, 2005, respectively.

25 B. Kalkhoven's Answer

26 Lead Plaintiff seeks to strike averments in Kalkhoven's
27 answer in which Kalkhoven denies knowledge and information with
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1 respect to certain events that occurred after his retirement
2 announcement on May 18, 2000. Lead Plaintiff argues that
3 information relating to these events is within Kalkhoven's
4 knowledge, and that the SACC's corresponding allegations should
5 therefore be deemed admitted by Kalkhoven under Federal Rule of
6 Civil Procedure 8(d).

7 Lead Plaintiff's argument is not well-taken. Whether or
8 not Kalkhoven had or should have had knowledge of company-
9 related activities after his retirement announcement is a
10 question of fact; factual determinations are not appropriate in
11 a Rule 12(f) motion to strike.

12 Lead Plaintiff also seeks to strike (1) averments in which
13 Kalkhoven denies the SACC's characterization of language in
14 certain documents and emails, and (2) averments in which
15 Kalkhoven does not respond to allegations made against the JDS
16 Defendants.

17 Again, Lead Plaintiff's arguments are not well-taken. Lead
18 Plaintiff cites no authority from this circuit holding that
19 denials of a complaint's characterizations or representations of
20 documents are improper, nor does it cite Ninth Circuit authority
21 holding that a party must respond to allegations made against
22 other parties. Kalkhoven's answer gives Lead Plaintiff fair
23 notice of his positions relating to each averment in the SACC,
24 and that is all that is required at the pleading state of
25 litigation. Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

26 For the foregoing reasons, and because the motion was not
27 timely filed, Lead Plaintiff's motion to strike certain
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1 averments in Kalkhoven's answer must be denied.

2 C. JDS Defendants' Answer

3 Lead Plaintiff also moves to strike several responses in
4 the JDS Defendants' answer. These responses state that the JDS
5 Defendants lack knowledge or information to form a belief as to
6 the veracity of the allegations that various confidential
7 witnesses reported certain activities occurring at JDS
8 facilities around the country. Lead Plaintiff argues that these
9 denials are improper because the JDS Defendants must have known
10 about the alleged activities. Lead Plaintiff requests that the
11 corresponding allegations be deemed admitted by the JDS
12 Defendants pursuant to Federal Rule of Civil Procedure 8(d).

13 Again, Lead Plaintiff's motion seeks factual determinations
14 that are not appropriate in a Rule 12(f) motion. As the JDS
15 Defendants note, Lead Plaintiff's contention that they must have
16 known about the information giving rise to the allegations cited
17 by Lead Plaintiff requires determinations, without the benefit
18 of discovery, that (1) the allegations are true, and (2) the JDS
19 Defendants had access to the information that forms the basis of
20 the allegations, which is a central dispute in this litigation.
21 Such factual determinations are premature at this point in the
22 litigation.

23 For the foregoing reasons, and because the motion was not
24 timely filed, Lead Plaintiff's motion to strike certain
25 averments in the JDS Defendants' answer must be denied.

26 II. Motion for Partial Judgment on the Pleadings

27 Defendants move for judgment on the pleadings on each cause
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1 of action that Lead Plaintiff asserts under the Exchange Act.
2 Defendants argue that the Supreme Court's ruling in Dura
3 Pharms., Inc. v. Broudo, __ U.S. __, 125 S. Ct. 1627 (2005),
4 renders Lead Plaintiff's Exchange Act claims deficient as a
5 matter of law because Dura rejected the SACC's theories of
6 economic loss and loss causation.

7 In Dura, the plaintiffs brought a securities fraud action
8 against the defendant, alleging that certain officers and
9 directors had made misleading public statements about, inter
10 alia, the company's drug profits. 125 S. Ct. at 1629-30. The
11 plaintiffs alleged economic loss based solely upon paying
12 artificially inflated prices for Dura securities. Id. at 1630.
13 After the district court dismissed the complaint, the Ninth
14 Circuit reversed, ruling that the plaintiffs could allege
15 economic loss simply by alleging that they had paid artificially
16 inflated stock prices. Id. The Supreme Court reversed, ruling
17 that "an artificially inflated purchase price might mean a later
18 loss. But that is far from inevitably so." Id. at 1632. The
19 Court held that the plaintiffs, in alleging only that the stock
20 prices were inflated on the day that they were purchased, had
21 failed adequately to allege a theory of economic loss and loss
22 causation.

23 Defendants contend that the SACC's Exchange Act claims rely
24 upon the same theory of economic loss and loss causation as did
25 the Dura plaintiffs. That is not the case. In Dura, the
26 plaintiffs alleged economic loss based solely upon paying
27 inflated securities prices. The SACC alleges that Defendants

1 misrepresented the value of JDS's inventory, the value of its
2 goodwill, and the demand for its products, and that, on each
3 occasion in which JDS subsequently disclosed publicly the actual
4 financial situation as it related to these three indicators
5 among others, the company's stock price fell the following day
6 as a direct result of each disclosure. Thus, the SACC alleges
7 economic loss as a result of falling stock prices due to public
8 disclosures of economic indicators that had previously been
9 artificially inflated.

10 In support of its position, Lead Plaintiff cites In re Daou
11 Sys., Inc., __ F.3d __, 2005 WL 1431833 (9th Cir. June 21,
12 2005), decided after Dura, in which the Ninth Circuit ruled as
13 follows:

14 Plaintiffs' economic loss was not that they purchased stock
15 at inflated prices; rather, their economic loss was the
16 decline in their stock value that was the direct result of
17 Daou's misrepresentations. See Dura Pharms., 125 S. Ct. at
18 1631-32. Here, the TAC's assertions of a steep drop in
Daou's stock price following the revelation of Daou's true
financial situation are sufficient to enable the complaint
to survive a motion to dismiss under Federal Rule of Civil
Procedure 12(b)(6).

19 Thus, Lead Plaintiff adequately alleges that it suffered
20 economic loss as a result of Defendants' misrepresentations and
21 subsequent disclosures of JDS's true financial health.

22 For the foregoing reasons, Defendants' motion for partial
23 judgment on the pleadings on Lead Plaintiff's Exchange Act
24 claims must be denied.

25 CONCLUSION

26 Thus, the Court DENIES Lead Plaintiff's motion to strike
27 certain averments in the answer filed by the JDS Defendants

(Docket No. 248), DENIES Lead Plaintiff's motion to strike certain averments in the answer filed by Kalkhoven (Docket No. 254), and DENIES Defendants' motion for partial judgment on the pleadings (Docket No. 272).

IT IS SO ORDERED.

Dated: 7/21/05

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge